Open Court today so that he may have the amplest opportunity to do so.

Having heard him, I shall now dismiss the application for the reasons which I now proceed to state.

In the first place, the judgment-creditor cannot make the estate of the deceased liable on contracts entered into by the representative. In *Farhall* v. *Farhall* [1] the principle is so clearly enunciated as to leave no room for any argument. There Sir W. M. James L.J. said:

"In this case it seems to me quite clear that there was no legal debt due from the estate to the bank. The executrix borrows money as executrix, says that she is executrix, and the bank debit her as executrix. To say that this charges the estate would give executors power to create debts to an unlimited extent. The executor has the power to realise the personal estate and to pledge specific assets, which is one mode of realising them. Here the executor has also power to pledge the realty; and I have myself, by a former order, given the bankers the full benefit of the charge they had on part of the real estate, and held them not answerable for any devastavit the executrix committed as to the moneys raised by that mortgage. But to say that the executrix can, by borrowing money, enable the person who has lent it to stand as a creditor upon the estate, is a position supported by no authority and no principle. The contract is with the executrix; there is no loan to the estate; there is no credit given to the estate; the credit is given only to the person who borrows, though the money may be borrowed for the purposes of the estate."

Here the contract in writing which was exhibited to the Statement of Claim was clearly a contract entered into by the judgment-debtor in his own personal capacity as vendor. Were he contracting even in his representative capacity, pursuant to directions given by the testator to carry on business, the liability of the representative is still the same. As Fry J. said in *In re Morgan, Pillgrem* v. *Pillgrem*: [2]

"It appears to me that the principles which regulate questions of this sort are very clear. As I understand them, where a trustee or executor carries on a business under the directions contained in the will of the testator, and in that character contracts a debt, the debt is one for which an action must be brought against the executor personally, and for which judgment must be obtained *de bonis propriis* of the executor, and no action can be successfully brought against the executor as executor, and no execution can be had *de bonis testatoris*, for this very simple reason, that the debt was not the debt of the testator. In making these observations I say nothing about the right which the executor undoubtedly has to come against the assets of the testator."

In the second place, Mr. Devaser contended that the amendment was not made under the "slip rule" Order 28, rule 11, but under rule 12. I think it is a complete fallacy to suggest that when a judgment drawn up gives effect, and no more than effect, to the intention of the Court, it can nevertheless be corrected under rule 11 or 12: See *MacCarthy* v. *Agard*: [3] Commenting on that case in *Pearlman (Veneers) S.A. Pty. Ltd.* v. *Bernhard Bartels*, [4] Hodson L.J. said:

"I agree . . . with the careful judgment of Slade J., and with his analysis of what happened in *MacCarthy* v. *Agard* to which reference has been made. There is, in my view, no question of altering the judgment itself, which could not be done either under the slip rule or under the general power to amend contained in R.S.C., Ord. 28 rule 12, which provides: The Court or a Judge may at any time, and on such terms as to costs or otherwise as the Court or Judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings."

There the Court allowed an amendment which did no more than correct a misnomer, but in no way affected the substantive judgment.

In the present case the judgment-creditor seeks not only to amend by adding the description of the defendant but also, under the cloak thereof, to alter the very judgment itself, from one *de bonis propriis* to one *de bonis testatoris* and thereby alter the operative and substantive part of the judgment. In expressing my own views as to the impropriety of the order which Mr. Devaser had obtained on December 5, 1960, I should make it clear that I am not pretending to rehear any application concerning that order. I would respectfully agree with the Singapore Court of Appeal in *Savena Supramaniam Pillay v. Tan Kah Chiat, Administrator of Tan Kong Leang, deceased,* [5] that the amendment was made without jurisdiction and must be disregarded.

Lastly, even if this application did not suffer from the fatal defects I have mentioned above, I should nevertheless reject it because the first prohibitory order issued on February 12. 1960 had lapsed after six months, and under Order 43, rule 2(7) it is provided that:

"When a judgment-creditor has obtained in any suit or proceeding a prohibitory order, in execution of an order or judgment in such suit or proceeding, affecting any immovable property or registered interest therein, no further prohibitory order affecting the same property or interest shall be made in the same suit or proceeding in execution of the same order or judgment on the application of such judgment-creditor or of any other person unless the Court or a Judge shall by order otherwise direct, on the ground of the existence of special circumstances."

No special circumstances have been disclosed.

For these reasons I would dismiss the application.

Application dismissed.

SHANMUGAM PILLAI v. PANJALI

[A.C.J. (Ismail Khan J.) June 8, 1961]

[Seremban — Civil Appeal No. 3 of 1961]

Practice and Procedure — Stay of execution pending appeal — Refusal by President of Sessions Court — Appeal against order — R.S.C., O.59, r.12, O.70 r.1.

Where a subordinate Court has refused an application for a stay of execution pending appeal, an appeal against that refusal is not authorised by any rule of procedure and is therefore an illegality which is not cured by O.70 r.1. The proper procedure is an application to the High Court for a stay of execution under O.59 r.12.

Cases referred to:—

(1) *Cropper* v. *Smith* (1883) 24 Ch. D. 305.

(2) *Smurthwaite* v. *Hannay*, [1894] A.C. 494.

CIVIL APPEAL.

Edgar Joseph Jr. for the appellant.

V. C. George for the respondent.

Ismail Khan J.: The appellant was ordered by the learned President, Sessions Court, Seremban, to give up vacant possession of the front half of the ground floor of premises No. 135, Paul Street, Seremban, to the respondent, and to pay costs. Against this order he appealed. He also made an application to the learned President for a stay of execution pending the appeal but this application was refused. This appeal is against this refusal of the learned President to grant a stay of execution.

Mr. George for the respondent raised the preliminary objection that the step taken by the appellant in appealing against the refusal of the stay of execution is not warranted by any rule of procedure. He referred to Order 59, rule 12, which reads as follows:—

"An appeal shall not operate as a stay of execution under the decision appealed against except in so far as the Court appealed from or the High Court may order, and any application for stay shall be made in the first instance to the Court appealed from."

The Court below and the High Court have therefore a co-ordinate jurisdiction to entertain an application for a stay of execution but as regards the High Court, while it has an independent jurisdiction to stay proceedings, pending an appeal, it is not to exercise that independent jurisdiction until an application has been made to the same effect and decided upon in the Court below. The reason for this is that the High Court and the Court below may not, to use the words of Brett, M.R. in the case of *Cropper* v. *Smith*, [1] at page 308, "incur the risk of deciding in different ways as to staying proceedings without either of them knowing of the application to the other." It is clear that on the refusal by the learned President of the application for a stay of execution the only other course open to the appellant would have been to apply to this Court in its original jurisdiction for a stay. Therefore, where a special procedure is prescribed, as in this case, by an application to the High Court to grant a stay of execution of a judgment in the Court below, pending appeal, I am not prepared to say that an entirely different step taken to achieve that object, as it has been done in this case by appealing against the refusal for a stay of execution by the Court below, is a curable irregularity. I have no power to convert an appeal into an application. I am reminded of Lord Herschell's judgment in *Smurthwaite* v. *Hannay*, [2] at page 501, where his Lordship in speaking of a joinder of plaintiffs which is not authorised by the rules of procedure observed: "If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity." In fact, in my opinion, the step taken by the appellant by way of an appeal is an illegality and I may say at once that Order 70, rule 1 has no application.

I have no doubt it will be competent for the appellant to apply to this Court again in proper proceedings.

This appeal is dismissed with costs.

Appeal dismissed.

PENANG YELLOW BUS CO. v. RURAL DISTRICT COUNCIL

[A.C.J. (Rigby J.) June 27, 1961]

[Penang — Civil Appeal No. 4 of 1961]

Appeal — Local Authority — Municipal assessment — Municipal Ordinance (S.S. Cap. 133), s.68(3) — Condition precedent.

On a preliminary point raised as to whether the conditions laid down in section 68(3) of the Municipal Ordinance were a necessary condition precedent to an appeal lying or being effectively constituted,

Held: the appeal is not properly before the Court by reason of the non-compliance with the provisions of section 68(3) at the time the Notice of Appeal was lodged and that no appeal, therefore, in fact lies.

Case referred to:—

(1) *Semantan Estate (1952) Ltd.* v. *Collector of Land Revenue* [1960] M.L.J. 300.

CIVIL APPEAL.

Lim Huck Aik for the appellant.

Eusoffe Abdoolcader for the respondent.

Rigby J.: This is an appeal brought by the Penang Yellow Bus Co. Ltd. against the Rural District Council, Penang Island, in respect of the assessment of the annual value relating to premises owned by the appellants, for the year 1960. A preliminary point has been taken by Mr. Eusoffe Abdoolcader on behalf of the respondent and both Mr. Eusoffe Abdoolcader and Mr. Lim Huck Aik, who appears for the appellants, have asked for a decision to be given on the preliminary point raised at this stage, and have agreed that in the event of the preliminary point so raised being unsuccessful, the appeal should be adjourned to another date for expert evidence to be given. The point taken by Mr. Eusoffe Abdoolcader is that having regard to the provisions of section 68(3) of the Municipal Ordinance the appeal is not properly before the Court and no appeal in fact lies by reason of the non-compliance by the appellants with conditions precedent laid down in that section to an appeal being constituted or lying. Section 68(3) of the Municipal Ordinance provides that:—

"No appeal shall lie against any assessment if the assessment being due is unpaid....."

It is contended by Mr. Eusoffe Abdoolcader that having regard to the provisions of sections 59(3) and 399(9) of the Ordinance and the notification thereunder, the assessment due in fact remained unpaid at the time the Notice of Appeal was lodged in this Court.

For purposes of the argument before me the brief facts of the case are that by a Notice dated the 2nd October, 1959, and given under the provisions of section 62(3) of the Municipal Ordinance, the appellants were informed that the Assessment List for the year 1960 "will contain a revised annual value of $66,000 on their premises." The previous annual value had, in fact, been $53,100. The appellants objected to that revision in accordance with the provisions of section 62(4) of the Ordinance, and their